Office-Supreme Court, U.S.
FILED
NOV 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-195 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

OHIO POWER COMPANY, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, in reviewing the promulgation by the Environmental Protection Agency of air pollution emission limitations pursuant to the Clean Air Act, 42 U.S.C. 7401 *et seq.*, properly remanded for further consideration one of the agency's factual determinations which the court found unsupported by the administrative record, without ordering repromulgation of the agency's emission limitation in its entirety.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 729 F.2d 1096. A previous opinion of the court of appeals (Pet. App. 9a-22a) is reported at 578 F.2d 660.

JURISDICTION

The judgment of the court of appeals (Pet. App. 96a-97a) was entered on March 22, 1984. A petition for rehearing was denied on May 8, 1984 (Pet. App. 98a). The petition for a writ of certiorari was filed on August 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 42 U.S.C. (1970 ed.) 1857 *et seq.*,[1] directed the United States Environmental Protection Agency (EPA) to ensure that a plan for the control of air pollution is established in each state. See *Train* v. *NRDC,* 421 U.S. 60 (1975). The State of Ohio failed to develop a plan for the control of sulfur dioxide pollution that satisfied the requirements of Section 110(a), 42 U.S.C. 7410(a). Accordingly, as required by Section 110(c), 42 U.S.C. 7410(c), EPA promulgated its own control plan for sulfur dioxide emissions in Ohio, including limitations on power plants operated in Ohio by petitioner. 41 Fed. Reg. 36324 (1976).

Shortly thereafter, petitioner and others sought judicial review of the plan in the court of appeals pursuant to Section 307(b)(1), 42 U.S.C. 7607(b)(1). The court of appeals issued two decisions. Its first decision, issued February 13, 1978, concerned questions applicable to all utility companies involved in the appeal. It held that the EPA hearings on the control plan were procedurally adequate and approved the computer model used by EPA to set emission standards for pollution sources in urban areas. *Cleveland Electric Illuminating Co.* v. *EPA,* 572 F.2d 1150 (6th Cir.), cert. denied, 439 U.S. 910 (1978).

In its second decision, the procedural aspects of which are challenged in the instant petition, the court of appeals reviewed the methods EPA used to set emission limitations for pollution sources in rural areas (Pet. App. 1a-8a). The court approved EPA's plan for controlling the ambient air affected by four rural sources of air pollution in Ohio.[2] It

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[1]The Clean Air Act is now 42 U.S.C. 7401 *et seq.* See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 *et seq.*.

[2]Two of the four sources were power plants operated by petitioner. See Pet. App. 2a, n.1.

also affirmed EPA's specific emission limitations developed for those sources and the agency's modeling techniques (the MAXT-24 model)[3] for predicting the sources' sulfur dioxide pollution, with one exception (Pet. App. 2a, 10a-13a, 17a-22a). That exception involved EPA's use in the approved MAXT-24 model of what was termed the "Class A assumption" or "Class A co-efficient" in determining pollution dispersion under "least stable" wind conditions in rural areas of complex terrain (Pet. App. 4a, 16a-17a).[4] The emission limitations for petitioner's power plants, among others, had been determined by employing the Class A assumption in the MAXT-24 model (Pet. App. 72a-73a).

The court held that "[o]n this present record" the use of the Class A assumption was "arbitrary and capricious" (Pet. App. 16a). It noted that EPA's justification for using the Class A assumption was that no better solution had been proposed. The court found that the record did not show that EPA had considered adequately several studies cited by industry petitioners that they claimed supported the use of Class B stability coefficients. Therefore, the court remanded for EPA to reconsider the question of the proper coefficient to use in setting emission limitations under Class A meteorological conditions, explicitly setting the limits of the remand (Pet. App. 17a):

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[3]This is also referred to as the CRSTER model (see Pet. App. 15a).

[4]Meteorological conditions are classified into six categories of stability (from Class A to Class F), representing the rate at which emissions from a source would disperse in the atmosphere under those meteorological conditions. The categories were based on the relative stability of the weather conditions, Class A being the least stable and Class F being the most stable. Under the Class A conditions, the "plume" of emissions from a source reaches the ground the most rapidly and directly. See Pet. App. 13a-14a.

> By pointing out [a] proposed solution, we do not mandate its acceptance by United States EPA. Our ultimate action on this score is simply to remand this issue to United States EPA for further study. This might result in the writing of a new record which supplies the now missing support for the use of Class A coefficients for the least stable wind condition in rural counties, or it might result in United States EPA's adoption of use of the Class B coefficients for the two least stable wind conditions, or it might result in a new record which supports a wholly new solution.

Petitioner did not immediately seek review of that decision in this Court. Several other parties did, but not on the issue presented in the instant petition. This Court denied their petitions for certiorari. 439 U.S. 1114 (1979).

In response to the court of appeals' remand order, EPA published a notice in the Federal Register stating its preliminary conclusions and soliciting public comment on its reconsideration of the use of the Class A assumption for the least stable meteorological conditions. 44 Fed. Reg. 7798 (1979). In that notice, the agency also stated that the effect of the court of appeals' decision was to stay the application of the emission limitations which were based on the Class A assumption pending its reconsideration.

The agency's decision on remand was issued on June 19, 1980 (Pet. App. 28a-59a). EPA's review showed that the use of the Class A assumption for least stable meteorological conditions was justified, and therefore was correctly used in setting the emission limitations for the four sources in question. In reaching its decision, the agency had reconsidered the arguments previously submitted by the utilities, including petitioner, and had reviewed field data not previously considered during the initial rulemaking. In addition, the agency considered the comments submitted in response to its February 1979 notice and evaluated new alternatives and

further data, as suggested by the comments. However, EPA concluded that the commenters had provided no technical basis to support changing the agency's use of the Class A assumption, and that, in fact, the latest data reviewed indicated further support of the Class A assumption (Pet. App. 59a).

In July and August 1980, the utilities concerned, including petitioner, petitioned EPA for reconsideration of its June 19, 1980 decision. They alleged they had new information to support changing the emission limitations and further criticized the agency's previous decision. After reviewing the comments submitted, the agency, on November 3, 1980, rejected the petitions for reconsideration (Pet. App. 71a-91a). EPA found that the data presented by the petitioners either was not new and had been addressed before or was not relevant to the issue at hand (Pet. App. 76a-80a). In addition, the agency found that the petitioners' renewed objections to its June 19, 1980 decision did not warrant a revision in the original emission limitations (Pet. App. 80a-90a). On the same day, EPA restarted the compliance schedules and revised the attainment dates in the Ohio state implementation plan for the sources in question, noting that the application of the emission limitations had been stayed pending its review of the Class A assumption (Pet. App. 63a-70a).

Various parties again petitioned the court of appeals for review of EPA's decision. Petitioner herein, along with the other utilities, raised extensive criticisms of the factual basis for EPA's decision to retain the use of the Class A assumption. They also claimed that the agency's reconsideration of the issue was procedurally unsound because it had failed to give a meaningful opportunity for notice and comment. Finally, the utilities asserted that EPA had improperly failed to repromulgate, pursuant to Section 306(d) of the Clean Air Act, 42 U.S.C. 7606(d), the emission limitations

applicable to their power plants, which they believed had been vacated in the court of appeals' previous remand order.

The court of appeals affirmed EPA's decision (Pet. App. 1a-8a). It noted that it had previously approved all aspects of EPA's implementation plan for Ohio, except its use of the Class A assumption to determine pollution dispersion under least stable wind conditions in rural areas. That ruling, the court pointed out, was based on its view that the administrative record presented in that appeal was inadequate to support the choice of the Class A assumption and, therefore, the case was remanded for further consideration of that issue. Pet. App. 4a-5a. Thus, the court ruled (Pet. App. 5a):

> [T]he sole issue of practical significance before this court at this time is the question as to whether or not the EPA, since the remand, has properly carried out this court's mandate to undertake further study of the basis for the use of Class A coefficients, and whether, if so, the record now supports EPA's renewed determination that the Class A coefficients should continue to be used for power plants in rural areas.

Rejecting what it termed "many newly stated arguments from EPA's opponents," the court held "that we carefully limited the remand to a single issue and that we should now decide only that issue" (Pet. App. 6a). The court agreed with EPA that full repromulgation proceedings under Section 307(d) of the Clean Air Act had not been required, since the proceedings on remand had not constituted promulgation or revision of an implementation plan (Pet. App. 6a n.2). Applying the "arbitrary and capricious" standard of review in Section 307(d)(9)(A) of the Clean Air Act, 42 U.S.C. 7607(d)(9)(A), the court found that the agency's reaffirmation of the use of the Class A assumption was proper (Pet. App. 6a-8a).

ARGUMENT

The only issue raised in the petition involves the format of the 1978 decision: petitioner challenges the propriety of the court of appeals' procedure of remanding EPA's promulgation of an air pollution implementation plan for Ohio for reconsideration simply of the one factual finding not supported by the administrative record. That decision was correct, and does not conflict with any decision of this Court or of any other court of appeals.[5] Accordingly, and particularly in light of EPA's consideration of petitioner's objections on the remand, further review by this Court is not warranted.

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[5]Although petitioner now contends (Pet. 6) that the question presented is "an important and unsettled question of administrative law," it neither sought this Court's review of that question in 1978, nor raised the question in its second petition for review in the court of appeals. Instead, petitioner merely assumed that the court of appeals had vacated the emission limitation, and argued, based on that assumption, that EPA should repromulgate the rule. The challenge to the 1978 order raised here was first made in the petition seeking rehearing of the court of appeals' 1984 order — too late for that court to consider it. See *Jamestown Farmers Elevator, Inc.* v. *General Mills, Inc.*, 552 F.2d 1285, 1295-1296 (8th Cir. 1977); *Bullock* v. *Mumford*, 509 F.2d 384, 385-389 (D.C. Cir. 1974); *United States* v. *Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970), cert. denied, 409 U.S. 1078 (1972). This Court does not ordinarily decide questions that have not been properly raised for consideration by the courts below. See, *e.g. Youakim* v. *Miller*, 425 U.S. 231, 234-235 (1976).

We do not here challenge petitioner's claim (Pet. 2, 6 n.5) that this Court now has jurisdiction to consider petitioner's objections to the 1978 order. But cf. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 378-379 (1965) (suggesting that issues presented only in first appeal from agency order would be barred on review of second appeal). Nevertheless, this Court has recognized that challenges alleging that the reviewing court has overstepped the bounds of its authority in remanding to the agency for further consideration should not be delayed. "Clearly the effect of the [remand] order is immediate and irreparable, and any review by this Court of the propriety of the order must be immediate to be effective" (*FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976)). This Court should accordingly reject petitioner's attempt further to delay the implementation of the emission limitations imposed on it.

1. Petitioner insists here, as it did in the court of appeals, that the court in 1978 found EPA's emission limitation invalid and therefore should have vacated and remanded that rule for repromulgation (see Pet. 6, 7, 9, 10). Petitioner still seems unwilling to concede that the court below knew and said precisely what it intended to do. In fact, the court made the simple finding that EPA's decision that the Class A coefficient was the most accurate representation of the dispersion of air pollution under certain meteorological conditions was not supported "[o]n the present record," and should be given further consideration by the agency (see pages 2-4, *supra*).[6] The question presented by the petition, then, is equally simple — whether a court may properly remand an agency's determination on one issue for further consideration without also vacating the overarching rule-making.

Contrary to petitioner's claim (Pet. 11-15), the court of appeals' remand was completely harmonious with this Court's view of the proper role of courts in the review of agency action under the Administrative Procedure Act (APA), 5 U.S.C. 706, and other statutes.[7] A review of this

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[6]Petitioner's suggestion (Pet. 5 n.3) that the court of appeals' mandate in its 1978 decision was unclear is not believable. As petitioner notes, the Sixth Circuit did, in a different case, *Columbus & Southern Ohio Electric Co.* v. *Costle*, 638 F.2d 910, 911 (1980), off-handedly state that the emission limitations had been set aside. But that reference could not have confused petitioner here, since it came well after EPA had undertaken the reconsideration required by the remand. Furthermore, the clarity of the 1978 remand order was affirmed by the Sixth Circuit itself when, in its 1984 opinion here, it noted that its previous decision had "carefully limited the remand to a single issue" (Pet. App. 6a). Thus, the court's reference in *Columbus* to the emission limitations was a mistaken one, which should have had no effect on petitioner here.

[7]Petitioner makes a curious attempt (Pet. 12 n.8) to show that the APA and not the Clean Air Act governed the court of appeals' review in 1978 of EPA's emission limitations. This claim is wrong. The court's jurisdiction to hear a direct appeal from EPA's promulgation of the 1976 implementation plan derived from the Clean Air Amendments

Court's decisions on which petitioner relies shows the Court's concern has always been to ensure that courts do not encroach too far into the realm properly occupied by the administrative agencies. Thus, the Court has turned aside lower court attempts, when an administrative record is inadequate to support an agency action, either to delve into the record itself in order to supply an appropriate explanation[8] or to conduct its own de novo factual proceedings.[9] Likewise, the Court has prohibited lower courts from

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of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1707. The 1977 amendments to the Clean Air Act (Pub. L. No. 95-95, § 305(a), 91 Stat. 772) added Section 307(d)(9), which states that the court of appeals "may reverse" any EPA action enumerated in Section 307(d)(1) which is found to be "arbitrary and capricious." The 1977 amendments were to be effective immediately, pursuant to Section 406 of Pub. L. No. 95-95, 91 Stat. 795, as amended by Pub. L. No. 95-190, § 14(a) (91 Stat. 1405). See *League to Save Lake Tahoe, Inc.* v. *Troundary*, 598 F.2d 1164, 1172-1173 (9th Cir.), cert. denied, 444 U.S. 943 (1979). Thus, review of EPA's implementation plan in 1978 was governed by the Clean Air Act, as the court of appeals correctly noted (Pet. App. 16a).

However, as petitioner notes, Congress intended that the Clean Air Act's standard of review should reflect the same rigorous standard previously applied by the courts to review Clean Air Act regulations under the APA. H.R. Conf. Rep. 95-564, 95th Cong., 1st Sess. 178 (1977). The legislative history does not address the change in language from the APA's direction that unlawful agency actions "shall" be "set aside" to that in the Clean Air Act, which states that courts "may reverse" unlawful EPA actions. While the Clean Air Act language would seem more permissive, the courts have considered their duties under that statute, in this respect at least, to be the same as under the APA. See *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 519-520, 521 (D.C. Cir. 1983); *Kennecott Corp.* v. *EPA*, 684 F.2d 1007, 1013 (D.C. Cir. 1982); *Sierra Club* v. *Costle*, 657 F.2d 298, 391-392 (D.C. Cir. 1981). We see no reason to dispute this since, as shown below, the court of appeals' remand order was proper under the APA standard.

[8] *FCC* v. *Schreiber*, 381 U.S. 279 (1965); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

[9] *Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

dictating to agencies the manner in which remand proceedings should be handled.[10] The remand order of the court of appeals here, then, was in keeping with this Court's rulings. The agency determination found unsupported by the record was remanded for further proceedings, leaving EPA free to determine how best to remedy the flaw in the record and what actions to take once that flaw had been corrected. The court of appeals' order thus fully respected the agency's prerogatives. See note 17, *infra.*

In addition, in defining the courts' proper role, this Court has never imposed the sort of "all or nothing" review powers that petitioner advocates. Rather, the Court decided in *Ford Motor Co.* v. *NLRB,* 305 U.S. 364 (1939), that remand for further proceedings on distinct issues was proper and "familiar appellate practice" (305 U.S. at 373). Indeed, the Court found that review procedure particularly appropriate in the review of agency action since its purpose was "consonant with that of the administrative proceeding itself, — to secure a just result with a minimum of technical requirements" (*ibid.*). See also, *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156 (1962).

Petitioner asserts (Pet. 6-7) that the lower courts have been confused and in conflict over whether partial remand for further proceedings is proper. In fact, quite the opposite is true. The lower courts have followed *Ford Motor Co., supra,* in a remarkably consistent manner. Virtually every circuit has recognized that it need not invalidate an otherwise proper administrative action in its entirety because the record fails adequately to support one or more findings upon which the action is based, or because of procedural errors. Indeed, the courts' practice of remanding limited issues for further consideration, or for correction of procedural errors, is most prevalent in the review of EPA

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[10] *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.,* 435 U.S. 519 (1978); *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326 (1976).

regulations governing air and water pollution.[11] Such judicial restraint in this technologically complex area of regulation is particularly warranted. The importance to the health and safety of the public of the timely promulgation of such regulations makes it impractical to require EPA to "start from scratch" each time a court finds an error in the agency's decision-making process, as petitioner advocates here. In addition, the courts apply the same principle of review authorized in *Ford Motor Co., supra,* in other regulatory areas.[12]

This established approach of the courts of appeals is not in conflict with the dictates of Section 706(2) of the APA, as petitioner insists (Pet. 11-12). Petitioner apparently believes that that provision permits or requires the courts to "set

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[11] *State of New Jersey* v. *EPA*, 626 F.2d 1038, 1050 (D.C. Cir. 1980); *New England Coalition on Nuclear Pollution* v. *NRC*, 727 F.2d 1127, 1131 (D.C. Cir. 1984); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 649-650 (D.C. Cir. 1973); *Kennecott Copper Corp.* v. *EPA*, 462 F.2d 846,850-851 (D.C. Cir. 1972); *South Terminal Corp.* v. *EPA*, 504 F.2d 646, 665-666 (1st Cir. 1974); *Friends of the Earth* v. *EPA*, 499 F.2d 1118 (2d Cir. 1974); *NRDC* v. *EPA*, 494 F.2d 519, 526 (2d Cir. 1974); *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377 (3d Cir. 1979); *Duquesne Light Co.* v. *EPA*, 522 F.2d 1186 (3d Cir. 1975); *FMC Corp.* v. *Train*, 539 F.2d 973 (4th Cir. 1976); *Central Power & Light Co.* v. *United States*, 634 F.2d 137, 178 (5th Cir. 1980); *American Meat Institute* v. *EPA*, 526 F.2d 442 (7th Cir. 1975); *United States Steel Corp.* v. *EPA*, 649 F.2d 572, 576-577 (8th Cir. 1981); *CPC International, Inc.* v. *Train*, 515 F.2d 1032, 1050 (8th Cir. 1975); *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 812-813 (9th Cir. 1980).

[12] *Asarco, Inc.* v. *OSHA*, 647 F.2d 1, 2 (9th Cir. 1981) (OSHA standards regulating employee exposure to inorganic arsenic); *United Steelworkers* v. *Marshall*, 647 F.2d 1189 (D.C. Cir. 1980) (OSHA standards regulating employee exposure to lead); *Rodway* v. *Department of Agriculture*, 514 F.2d 809 (D.C. Cir. 1975) (food stamp program regulations); *American Importers Ass'n* v. *CAB*, 473 F.2d 168 (D.C. Cir. 1972) (CAB order approving international carrier's agreement limiting time freight may be held at an airport free of demurrage).

aside" only arbitrary and capricious "rules" (Pet. 12). In fact, Section 706(2) is not so limited. It directs courts to set aside arbitrary and capricious "action, findings and conclusions."[13] Indeed, the courts have recognized that their duties under Section 706(2) of the APA coexist with their equitable discretion to fashion remand orders on discrete matters for further proceedings.[14]

Thus, the format of the court of appeals' 1978 remand order is fully in compliance with this Court's view of the proper methods of judicial review of agency action. Despite petitioner's attempt selectively to paint a contrary picture,[15] it is also completely consistent with the views of other

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[13]There is no dispute here that the effect of the court of appeals' decision was to set aside EPA's reliance on the Class A assumption, even though it did not explicitly so order (see Pet. App. 94a-95a). The agency treated that reliance as reversed and gave the matter full-blown reconsideration on remand. See pages 4-5, *supra*.

[14]See *Asarco, Inc.* v. *OSHA, supra; Western Oil & Gas Ass'n* v. *EPA, supra; Duquesne Light Co.* v. *EPA, supra; South Terminal Corp.* v. *EPA, supra.*

[15]All of the circuits referred to by petitioner (Pet. 7) obviously do not condemn the type of remand order fashioned by the court of appeals here, since they each have done the same in the appropriate circumstances. See page 11 & notes 11-12, *supra*. In addition, none of the cases cited by petitioner stands for the proposition that partial remand of the record for further consideration is prohibited. In some, the agency's actions were simply incurably wrong and had to be vacated for new proceedings. *California Cartage Company* v. *United States*, 721 F.2d 1199 (9th Cir. 1983); *Montana-Dakota Utilities Co.* v. *FERC*, 631 F.2d 557 (8th Cir. 1980). In others, while the agency action was vacated in full, the courts did not prohibit another solution. *ASH* v. *CAB*, 713 F.2d 795 (D.C. Cir. 1983); *Port Norris Express Co.* v. *ICC*, 687 F.2d 803 (3d Cir. 1982); *Tabor* v. *Joint Board for Enrollment of Actuaries*, 566 F.2d 705 (D.C. Cir. 1977). In *EDF, Inc.* v. *Costle*, 657 F.2d 275 (D.C. Cir. 1981), the court upheld the agency's action, and therefore did not address the proper scope of remand. The court in *Central Power & Light Co.* v. *United States*, 634 F.2d 137 (5th Cir. 1980), as noted above (page 11 n.11, *supra*), fashioned the same sort of remand order as did the court of appeals here.

circuits on the propriety of partial remand for further consideration.

2. Even if petitioner were correct on the merits, intervening events have long since rendered harmless any error in the format of the 1978 remand order. Petitioner's complaint that the court of appeals should have ordered repromulgation of the emission limitations, as well as reconsideration of EPA's reliance on the Class A assumption, presents a distinction without a difference. EPA treated the application of the emission limitations to petitioner as stayed by the court of appeals during its reconsideration of the Class A assumption (Pet. App. 64a; 44 Fed. Reg. 7798 (1979)). The Class A assumption was given a full airing and detailed study by the agency, and was found to be the proper coefficient for setting emission limitations.[16] Hence, the emission limitations were reinstated, and the compliance timetables restarted (Pet. App. 63a-70a), based on a then valid and fully supporting record. Since the only flaw in the record on which the emission limitations were based was then corrected without a change in the result, there was no practical need to reconsider the emission limitations themselves.[17]

Petitioner does not challenge EPA's substantive decision to reinstate the use of the Class A assumption. Rather, it puts forward only one reason why it was necessary to repromulgate the emission limitations despite this decision. It claims (Pet. 5, 14) that when EPA reconsidered the Class A assumption it used a "different modeling procedure" than it had in the initial rulemaking. Petitioner speculates that if EPA had repromulgated the emission limitations with this

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[16]See pages 4-5 *supra*; Pet. App. 28a-68a; 44 Fed. Reg. 7798 (1979).

[17]As EPA itself recognized, had another assumption been determined more appropriate than Class A, promulgation of new emission limitations would have been required (Pet. App. 58a).

change, it would have resulted in less stringent limitations, and a savings to petitioner of $29 million.

In fact, EPA did use a different computer model on remand in implementing the Class A assumption—the "MPTER" model. This model had the capability of calculating concentrations of pollution at specific designated locations which the previous model could not. Therefore, the MPTER model was used because it provided more accurate comparisons between model calculations and monitor data (Pet. App. 87a-88a). However, EPA specifically found that, except for the increased predictive accuracy of MPTER, the two models were equivalent in most respects (Pet. App. 88a). To be absolutely sure that the new model would result in no change in the emission limitations, EPA "remodeled" its calculations for petitioner's power plant using the MPTER, and compared the pollution concentrations found under both models. It found the differences in the two insignificant (Pet. App. 89a-90a). Thus, petitioner's claim that the change in the model used to implement the Class A assumption necessitated the repromulgation of the emission limitations is contradicted by the record.

In any event, the agency recognized the right of the parties before it to seek revision of the emission limitations. When petitioner here asked for reconsideration of the agency's reaffirmation of the Class A assumption, EPA treated the motion as a petition to revise the previously promulgated limitation rule pursuant to the APA, 5 U.S.C. 553(e) (Pet. App. 74a-75a). EPA then extensively reviewed the matters raised in the petition for reconsideration, which

largely presented allegedly new data to challenge the predictive accuracy of the Class A assumption. The agency determined that none of the matters raised warranted a change in the emission limitations, either because the data were not new or because they were not relevant to the Class A assumption's predictive accuracy (see page 5, *supra*; Pet. App. 75a-91a); the court of appeals agreed (Pet. App. 8a).

Thus, the failure of the court of appeals to order the formal repromulgation of the emission limitations, with all the attendant procedural trappings, even if incorrect, would not be a basis for reversal of the 1978 decision. Even if repromulgation under Section 307(d) had been required, EPA's actions on remand would have rendered any procedural error harmless under Section 307(d)(8) of the Clean Air Act, 42 U.S.C. 7607(d)(8), as the court of appeals itself held (Pet. App. 6a n.2).[18]

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[18]Under that Section, courts may not invalidate rules for procedural errors if the errors were not so serious that there is substantial likelihood the rule would have been significantly changed without them. The court of appeals referred to subsection (d)(9), which addresses the standard of judicial review of rules promulgated under the Clean Air Act and permits reversal for procedural error only when consistent with subsection (d)(8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1984

DOJ-1984-11